



# **The Law Commission**

**Working Paper No. 72**

**Second Programme, Item XVIII**

**Codification of the Criminal Law  
Treason, Sedition and Allied Offences**

**LONDON  
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It does not represent the final views of the Law Commission.

The Law Commission will be grateful for comments  
before 1 March 1978.

All correspondence should be addressed to:

J. C. R. Fieldsend  
Law Commission  
Conquest House  
37-38 John Street  
Theobalds Road  
London WC1N 2BQ  
(Tel: 01-242 0861 Ext: 215)

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THE LAW COMMISSION  
 WORKING PAPER NO. 72  
 SECOND PROGRAMME, ITEM XVIII  
 CODIFICATION OF THE CRIMINAL LAW

TREASON, SEDITION AND ALLIED OFFENCES

	<u>Contents</u>	<u>Paras.</u>	<u>Page</u>
PART I: INTRODUCTION			
Scope of the enquiry		1-11	1
PART II: TREASON			
A. <u>The Present Law</u>			
1. The Treason Act 1351		12-14	7
(a) Compassing the King's death		15-17	9
(b) Violation of the King's consort		18	10
(c) Levying of war		19	11
(d) Adhering to the King's enemies		20-24	12
Aid and comfort		23	14
Enemies		24	14
(e) Other forms of treason		25	15
(f) The mental element		26-29	15
(g) Overt act necessary		30-32	18
(h) Who can commit treason		33-34	20
(i) Punishment for treason		35	24
(j) Limitation		36	25
(k) Procedure		37	25
2. Treason felony		38-40	25

	<u>Paras.</u>	<u>Page</u>
3.	Misprision of treason	41-42 26
4.	Compounding treason	43 27
5.	Treason Act 1842	44 28
6.	Treachery Act 1940	45 29
	Persons to whom Treachery Act applied	46 30
7.	Statistics	47 30
B.	<u>Proposals for reform of treason</u>	
1.	Introductory	48-50 31
2.	Need for reform	51 32
3.	Offences of endangering the State in time of war	52-56 32
4.	Acts against the State in peacetime	57-61 35
5.	Protection of the Sovereign	62-66 37
6.	Misprision of treason	67 40

### PART III: SEDITION

A.	<u>The present law</u>	
1.	Introduction	68 41
2.	Elements of sedition	69 41
	(a) Intention to cause violence	70 42
	(b) Intention to disturb constituted authority	71-73 43
3.	Public mischief and sedition	74 45
4.	The nature of the intention required	75 45
B.	<u>Proposals for reform of sedition</u>	76-78 46

### PART IV: OFFENCES OF SUBVERTING THE FORCES AND THE LIKE

A.	<u>The present law</u>	
1.	General	79 49
2.	Incitement to Mutiny Act 1797	80 49

	<u>Paras.</u>	<u>Page</u>
3. Incitement to Disaffection Act 1934	81-85	50
4. Offences under the Armed Forces Acts	86	53
5. Police Act 1964	87-88	55
6. Aliens Restriction (Amendment) Act 1919	89	56
B. <u>Consideration of the general offences</u>	90-94	56

PART V: OTHER STATUTORY  
OFFENCES

	95	59
SUMMARY OF PROVISIONAL PROPOSALS	96	60
APPENDIX I		63
APPENDIX II		64

THE LAW COMMISSION

SECOND PROGRAMME, ITEM XVIII  
CODIFICATION OF THE CRIMINAL LAW

TREASON, SEDITION AND ALLIED OFFENCES

PART I: INTRODUCTION

Scope of the enquiry

1. In our Second Programme of Law Reform<sup>1</sup> we stated the need for a comprehensive examination of the criminal law with a view to its codification and we set out the first stages of the task. We recognised that it would be necessary to map out later stages as work progressed.
2. It has now been decided that we shall be the examining agency to review the law of treason and other offences which involve sedition or incitement to mutiny or disaffection from the Sovereign. We are not, however, asked to examine the offences created by the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957. Nor are we asked to examine the Official Secrets Acts.<sup>2</sup>
3. The question of the appropriateness of the death penalty for treason has not been referred to us, and we are not consulting and shall make no recommendation on this matter. We assume, however, that treason as the most serious offence in the calendar of crimes will carry a mandatory sentence. It follows that, in considering whether offences are to be offences of treason, we shall have to have regard to the fact that treason will carry a heavy penalty.

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1. (1968) Law Com. No. 14, Item XVIII, para. 2.  
2. Official Secrets Acts 1911, 1920 and 1939. Section 2 of the 1911 Act was reviewed by a Departmental Committee under the chairmanship of Lord Franks, (1972) Cmnd. 5104.



4. The ambit of those offences generally thought of as being aimed directly against the State has, in many instances, been extended to include activities more naturally categorised as offences against public order. For example, levying war against the King in his realm has been held to include any insurrection or rising to alter by force an established law,<sup>3</sup> and judicial construction has enlarged the scope of treason to include many acts which would seem to fall more naturally under the head of the much less serious offence of rioting.<sup>4</sup>

5. However, despite the overlap in practice between offences against the State and offences against public order, a clear dividing line can be drawn between them, and most modern textbooks on criminal law treat them separately.<sup>5</sup> We are not therefore in this report examining the common law offences of unlawful assembly, riot, rout or affray. Equally we thought it right to exclude those statutory offences which have as their object the preservation of the peace and public order generally. Consequently, despite the close relationship between certain acts of sedition and offences created by the Public Order Act 1936 and the Race Relations Act 1965<sup>6</sup> we think that these Acts will fall more naturally into a comprehensive examination of public order offences generally. Other statutes which might arguably be dealt with either here or in an examination of offences against public order are the Tumultuous Petitioning Act 1661, the Unlawful Drilling Act 1819, the Public Stores Act 1875 and

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3. Lord George Gordon's case (1781) 21 St. Tr. 485.

4. Kenny's Outlines of Criminal Law (19th ed., 1966), p.412.

5. Russell on Crime (12th ed., 1964) Vol. 1; Kenny's Outlines of Criminal Law (19th ed., 1966); Smith and Hogan, Criminal Law (3rd ed., 1973); Harris's Criminal Law (22nd ed., 1973).

6. See s.2(1)(b) of the 1936 Act and s.6(1) of the 1965 Act, and s.70 of the Race Relations Act 1976, still to be brought into operation. See too Stephen's History of the Criminal Law of England (1883) Vol. 2 at p.300.

the Public Meeting Act 1908.<sup>7</sup> We think, however, that these statutes can more appropriately be considered in a review of offences against public order and they are not covered in this working paper.

6. The field of our enquiry includes both common law and statutory offences. Treason itself was statutorily defined as long ago as 1351<sup>8</sup> and the common law was then entirely superseded. Statutory offences which relate to similar conduct to that covered by some offences of treason were created in 1848.<sup>9</sup> They are commonly known as treason felonies. At common law, offences of misprision of treason and compounding treason still exist,<sup>10</sup> and conviction for misprision entails forfeiture to the Crown of all the offender's goods and the profits of his lands during his life.<sup>11</sup>

7. Whilst the present law as to treason, though not always easy to apply in modern conditions,<sup>12</sup> can be stated with some degree of accuracy, the definition of the common law of sedition is uncertain. In the words of Fitzgerald J. -

"Sedition in itself is a comprehensive term and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and to stir

- 
7. The relevant parts of these Acts are summarised in Appendix I.
  8. Treason Act 1351.
  9. Treason Felony Act 1848.
  10. The common law offences of misprision of felony and compounding felony were abolished by the Criminal Law Act 1967.
  11. See Smith and Hogan, Criminal Law (3rd ed., 1973), p.646.
  12. See "Rhodesian Crisis - Criminal Liabilities" [1966] Crim. L.R. 5 at p.6 where the authors discuss treason in the light of the Unilateral Declaration of Independence by the Rhodesian Government in 1965. Cf. "Treason in Rhodesia", by Alan Wharam [1967] C.L.J. 189 and "Allegiance and the Usurper" by A.M. Honoré [1967] C.L.J. 214.

up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion."<sup>13</sup>

The most detailed modern discussion of sedition is to be found in a Canadian case<sup>14</sup> where Kellock J. reviewed the authorities in some detail; in his judgment he said -

"As is frequently mentioned in the authorities, probably no crime has been left in such vagueness of definition as that with which we are here concerned, and its legal meaning has changed with the years."<sup>15</sup>

8. Although sedition is a crime which is "nearly allied to treason",<sup>16</sup> it is based entirely on common law and has had its own separate development. We have therefore thought it better to treat treason and sedition separately. A consideration of the law of treason raises questions as to whether the whole statutory basis upon which the crime is founded ought not to be brought up to date; with regard to sedition the question is perhaps not so much what should be done to modernise and codify the offence as whether any offence of sedition is necessary in a modern criminal code. Accordingly, in Part II we deal with treason and in Part III with sedition. In Part IV we consider the statutory offences which involve sedition, incitement to mutiny or incitement to disaffection.

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13. R. v. Sullivan (1868) 11 Cox C.C. 44 at p.45.

14. Boucher v. R. [1951] 2 D.L.R. 369.

15. Ibid., at p.382.

16. "Sedition is a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval." per Fitzgerald J. in R. v. Sullivan (1868) 11 Cox C.C. 44 at p.45.

9. The substantive law of treason is the same throughout the United Kingdom. The old Scots laws of treason were abolished by the Treason Act 1708 which provided that -

"such crimes and offences which are high treason<sup>17</sup> or misprision of high treason within England shall be construed adjudged and taken to be high treason and misprision of high treason within Scotland and that ... no crimes or offences shall be high treason or misprision of high treason within Scotland but those that are high treason or misprision of high treason in England."

In addition the Scottish common law offence of sedition is very like (and perhaps identical with) the English common law offence,<sup>18</sup> and many of the Acts of Parliament which we have to consider apply to Scotland. We, however, cannot make recommendations concerning the law applicable to Scotland, and accordingly our consideration has been limited to the law in England and Wales. However, it is obvious that at some stage agreement as to any proposals for legislation will have to be arrived at between the appropriate Scottish and English authorities. All comments received on this working paper will be made available to the Scottish Law Commission.

10. The law of treason, treason felony and sedition and the Acts of Parliament dealt with in this paper apply in Northern Ireland, and in general our proposals are intended to apply both to that Province and to England and Wales, though we shall, of course, consult with the Office of Law Reform in Northern Ireland. We recognise that the violence in that Province, and indeed the implications for the United Kingdom as a whole of the use of violence for political ends may require some special measures, apart from our general

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17. "High treason" was a separate offence from "petit treason" (e.g., the killing of a master by his servant) but the latter offence was abolished as a form of treason by the Offences against the Person Act 1828, s.1.

18. See generally Gordon, Criminal Law (1967) Ch. 39.

proposals. This, however, is not a question which has been referred to us. The need for such measures is essentially a matter for political judgment and knowledge of detailed situations that may change with the passage of time. There may also be a need to take into account questions concerning international relations and international agreements that are outside our purview.

11. The law of treason and sedition is closely interwoven with the history of the United Kingdom over the last 600 years. We have, however, attempted to state the law as it is with as little reference as possible to its historical development. Interesting accounts of the history are easily available in the textbooks<sup>19</sup> and legal histories<sup>20</sup> and to burden this paper with an account, however brief, of the sporadic development of this branch of the law would be of little assistance in the task of seeking ways in which it can be improved and modernised.

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19. See in particular Russell on Crime (12th ed., 1964), vol. 1, p.207; Kenny's Outlines of Criminal Law (19th ed., 1966), p.295.

20. See in particular Hale's Pleas of the Crown, vol. 1, pp.76, 82, 87; Hawkins' Pleas of the Crown (6th ed., 1788), Book 1, ch. 17, p.49; Coke's Institutes, Part III, ch. 1; Stephen, A History of the Criminal Law of England, vol. 2, p.241.

## PART II: TREASON

### A. The Present Law

#### 1. The Treason Act 1351

12. Prior to the Treason Act 1351 the law of treason was both uncertain and arbitrary. Almost every offence that was, or seemed to be, a breach of the faith or allegiance due to the King, was by construction and interpretation raised to the offence of high treason.<sup>21</sup> The Treason Act 1351 was intended as a codification of the common law and is based on the feudal and personal duty of loyalty of all subjects to the monarch. As this Act is still the basis of the law of treason we set it out in full, in Appendix II, omitting only those parts which have been repealed.<sup>22</sup>

13. The heads of treason may be summarised as -

- (1) compassing or imagining the death of the Sovereign, his Queen or his eldest son and heir,
- (2) violating the Sovereign's wife, or his eldest daughter unmarried or the wife of his eldest son and heir,
- (3) levying war against the Sovereign in his realm,
- (4) being adherent to the Sovereign's enemies in his realm,
- (5) killing the Chancellor, Treasurer or the Sovereign's Justices, in their places doing their offices.

Section 3 of the Treason Act 1702 made it treason by overt act to attempt to deprive or hinder the person next in

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21. Hale's Pleas of the Crown, vol. 1, pp.82-83: see too n.17, above.

22. We have omitted counterfeiting the King's seal or his money and bringing in counterfeit money. These are no longer treason, by virtue of the statutes enacted since the early part of the 19th Century. See Russell on Crime (12th ed., 1964), p.208.

succession to the Crown from succeeding, and the Treason Act 1795 confirmed that it was treason to "compass, imagine, invent, devise or intend death or destruction, ... maim or wounding, imprisonment or restraint, of the person of ... the King, his heirs and successors" and to evidence this by any overt act or deed.

14. Over the years the courts, by somewhat strained interpretations particularly of the language of the first and third categories of treason, transformed the concept of the offence from that founded upon a breach of a feudal and personal duty of loyalty to the reigning monarch<sup>23</sup> into the modern concept which regards treason as "armed resistance made on political grounds to the public order of the realm".<sup>24</sup> As it exists today treason still requires a breach of a duty of allegiance, but this may be either a breach of personal duty to the Sovereign or a breach of a duty to the constitutional system of the realm, which has its embodiment in the Sovereign. The latter aspect is well illustrated by the Irish case of R. v. Sheanes<sup>25</sup>, where it was said by Lord Carleton C.J. that compassing and imagining the death of the Sovereign included -

"... forming conspiracies to usurp by force and in defiance of the authority of Parliament, the government of the kingdom, to destroy its constitution and in so doing to destroy the monarchy ... [so is] holding consultations or entering into agreement, or advising, soliciting

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23. The Treason Act 1495 provided in effect that service in war of the King de facto was not treason against a King de jure.

24. Stephen, General View of the Criminal Law (1863), p.36.

25. (1798) 27 St. Tr. 255, 387.

or persuading others for any such purposes, or assenting to such purposes ... the moment the power of the government is usurped, the king is in effect deposed; he is bound by the duty of his situation to resist such attempts, even at the peril of his life, and several acts which I have mentioned whereby his life may be endangered, have been deemed under the sound construction of the statutes, and upon principles of substantial political justice overt acts of compassing his death."

(a) Compassing the King's death

15. The first head of treason is compassing the death of the King or his heir. Insofar as this relates to the physical death, as opposed to the political death of the Sovereign, the persons protected by the statute are the Sovereign, whether King or Queen, who is Sovereign in fact for the time being,<sup>26</sup> the wife of a reigning King, and the eldest son and heir of a reigning Sovereign, whether King or Queen. It seems that the consort of a reigning Queen is not included among the persons protected,<sup>27</sup> and a special statute was enacted after the marriage of Queen Mary to King Philip of Spain in 1554 extending treason to the compassing of the death of King Philip.

16. The offence lies in "compassing or imagining" death but the law requires an overt act before the offence is established.<sup>28</sup> This may lie in the forming of a plot, or it may be found in the actual killing of the Sovereign. Thus

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26. Treason Act 1495.

27. Hale's Pleas of the Crown, vol. 1, p.106; Coke's Institutes, vol. 3, ch. 1, p.6, Hawkins' Pleas of the Crown, vol. 1, p.53, s.20.

28. R. v. Thistlewood (1820) 33 St. Tr. 681.



the actual killing of the King is, strictly, no more than the overt act by which the compassing of his death is established, and it was therefore for compassing the King's death that the twenty-nine regicides of Charles I were indicted.<sup>29</sup>

17. We have referred in paragraph 14 to the manner in which acts of subversion of the constitution have been brought within the head of treason related to compassing the death of the Sovereign. Thus it has been held that an act to end only the King's political life is now covered by the definition. An attempt to raise a rebellion against the King's power in an early Canadian colony has been held to amount to a compassing of his death,<sup>30</sup> as has the overt act of inciting foreigners to invade the kingdom.<sup>31</sup> The nature of the "overt act" is dealt with in paragraph 31 below.

(b) Violation of the King's consort

18. Under the second head the violation of the King's consort, eldest daughter unmarried or the wife of the King's son and heir is treason. This area of the law receives scant treatment in modern criminal law textbooks,<sup>32</sup>

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29. Russell on Crime (12th ed., 1964), vol. I, p.211, and see the cases there cited.

30. R. v. Maclane (1797) 26 St. Tr. 721.

31. Hensey (1758) 1 Burr, 642. Under s.3 of the Treason Felony Act 1848 offences of depriving the Sovereign of the style, honour etc. of the Crown and of inciting any foreigner to invade have been created.

32. Smith and Hogan, Criminal Law (3rd ed., 1973), p.640, set out this head of treason, but do not treat it further. Harris's Criminal Law (22nd ed., 1973), p.123 sets out the heading in a footnote having in the text referred to it as a colourful anachronism.

and is not accorded much consideration by Coke or Hale.<sup>33</sup> Violation constitutes treason even though the lady consents, and the consenting consort is herself guilty of treason, as in the cases of Ann Boleyn and Katherine Howard. It may also be that consent to violation by the wife of the King's son and heir may be treason in her.<sup>34</sup>

(c) Levying of war

19. Under the third head, it is treason to levy war against the King in his realm. The levying of war has been widely interpreted by the courts and a leading textbook summarises the effect of the decisions as follows<sup>35</sup> -

" 'War', here, is not limited to the true 'war' of international law, but will include any foreseeable disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a 'general' character, e.g. to release the prisoners in all the gaols. It is not essential that the offenders should be in military array or be armed with military weapons. It is quite sufficient if there be assembled a large body of men who intend to debar the government from the free exercise of its lawful powers and are ready to resist with violence any opposition".

A similar point is made more strongly by Hawkins.<sup>36</sup> Further, it is clear from the direction to the jury in R. v. Dowling<sup>37</sup> that it is not necessary that those assembling "should be in any military array, or with any military discipline or military arms, or with military banners". In R. v.

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33. Coke's Institutes, Part III, ch. 1, p.9; Hale's Pleas of the Crown, vol. 1, pp.128-129.

34. Coke's Institutes, Part III, ch. 1, p.9.

35. Kenny's Outlines of Criminal Law (19th ed., 1966), p.398.

36. Hawkins' Pleas of the Crown (6th ed., 1788), Book 1, ch. 17, s.25: "... those who make an insurrection in order to redress a public grievance ... and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, in as much as they incidentally invade his prerogative."

37. (1848) 7 St. Tr. (N.S.) 381 at p.460.

Gallagher<sup>38</sup> three members of the Fenian Brotherhood were found guilty of the treason felony of levying war against the Queen; their intention was to destroy public buildings by nitro-glycerine and other explosions in order to produce "the freedom of Ireland by force alone". Although they were only charged with treason felony it is clear that they were equally guilty of treason.<sup>39</sup>

(d) Adhering to the King's enemies

20. Under the fourth head it is treason to be adherent to the King's enemies in his realm, giving them aid or comfort in the realm or elsewhere. This form of treason is perhaps the most important, if only because of the reliance on it in each of the last two major wars in the well-known cases of R. v. Casement<sup>40</sup> and Joyce v. Director of Public Prosecutions.<sup>41</sup> Each of these cases settled an important aspect of the law of treason.

21. In R. v. Casement it was settled that adhering to the King's enemies outside the realm is treasonable. In that case the defence submitted that the indictment should be quashed on the ground that it disclosed no offence known to English law, since adherence to the King's enemies without the realm was not an offence against the Treason Act 1351.<sup>42</sup>

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38. (1883) 15 Cox C.C. 291.

39. See further paras. 38-40 below. It will there be seen that treason felony under the Treason Felony Act 1848 includes the compassing of war. High treason requires the actual levying of war: Coke's Institutes, Part III, ch. 1, p.9.

40. [1917] 1 K.B. 98; see too R. v. Lynch [1903] 1 K.B. 444.

41. [1946] A.C. 347.

42. It was argued that in the passage "if a man ... be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," the word "elsewhere" applied only to the location of giving aid or comfort, and not also to being adherent.

In dealing with that point Lord Reading C.J. said "as the offence is that of adhering to the King's enemies, if the words 'or elsewhere' do not apply to the adhering, then the contention of the defence would be right".<sup>43</sup> He stressed that the Court had to construe the words of the statute "now some five hundred and sixty years old, without reference to commas or brackets, but merely looking to the language".<sup>44</sup> Clearly it is unsatisfactory that the most serious of all criminal offences should turn on the construction of language some 600 years old, which is both obscure and difficult.

22. In Joyce<sup>45</sup> it was held that an alien abroad could still be guilty of treason provided he was enjoying the protection of the Crown at the time he adhered to the enemy. Joyce was not a British subject; though he had lived in England for many years, he was an American citizen having been born in New York of a naturalised American. He was, however, the holder of a British passport which he first applied for in 1933. His application forms stated falsely that he was a British subject born in County Galway, Ireland. A five-year passport was issued to him and this was renewed for a period of one year in 1938 and for a further year from 1 July 1939 and on each occasion Joyce repeated the declaration that he was a British subject. The particulars of the offence charged Joyce with adhering to the King's enemies, giving them aid and comfort by broadcasting to the subjects of the King propaganda on behalf of the enemy. Joyce was convicted and appealed unsuccessfully to the Court of Criminal Appeal and the House of Lords. The main question on appeal was whether an alien once, but no longer, resident within the realm could be held guilty and convicted in this country of treason in

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43. [1917] 1 K.B. 98, 122.

44. Ibid., at p.123.

45. [1946] A.C. 347.

respect of an act committed by him outside the realm.<sup>46</sup> The House of Lords held that an alien abroad holding a British passport enjoys the protection of the Crown and if he is adherent to the King's enemies he is guilty of treason, so long as he has not renounced that protection. The decision of the House of Lords has been severely and cogently criticised upon several grounds.<sup>47</sup>

#### Aid and comfort

23. Cases show that almost any aid and comfort to the enemy may amount to adherence. Joyce broadcast propaganda from Germany to Britain.<sup>48</sup> In *R. v. Lynch*,<sup>49</sup> a British subject was held guilty of treason by becoming naturalised in an enemy state in time of war. In *Natal* it was held in 1901 that by serving the Boer forces even as a cook a man gave them aid and comfort.<sup>50</sup>

#### Enemies

24. The meaning of "enemies" here is to be taken in the strict sense which international law gives the word and depends upon the existence of a state of war.<sup>51</sup> Whether a state of war exists between the British Government and any

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46. [1946] A.C. 347, 364, per Lord Jowitt L.C.

47. G.L. Williams, "The Correlation of Allegiance and Protection", (1948) 10 C.L.J. 54; W.L. Walker in Pitt Cobbett's Cases on International Law (6th ed.), pp.199-201; Biggs, "Treason and the Trial of William Joyce", (1947) 7 Toronto L.J. 162; see too Trial of William Joyce, Notable British Trials, pp.35-36.

48. *Joyce v. D.P.P.* [1946] A.C. 347.

49. [1903] 1 K.B. 444.

50. See Kenny's Outlines of Criminal Law (19th ed., 1966), at p.399, n. 5.

51. Kenny's Outlines of Criminal Law (19th ed., 1966), p.339: this, of course, is not the position in regard to the levying of war which constitutes treason as discussed in para. 19, above.

other state and, if so, when it began, is a fact of state. The courts take judicial notice of facts of state and, in any case of uncertainty, seek information from a Secretary of State. Information so received is conclusive.<sup>52.</sup>

(e) Other forms of treason

25. It is treason to kill the Chancellor, Treasurer or any of the King's judges "being in their places doing their offices." It is also treason to attempt by overt act to prevent the succession to the Crown of such person as by virtue of the Act of Settlement is entitled to succeed thereto. There is no modern instance of a prosecution for either of these forms of treason. The former would today undoubtedly be charged as murder.

(f) The mental element

26. The question of the mental element in treason arises principally in relation to the fourth category of offence, namely, adhering to the King's enemies, giving them aid and comfort. The issue arose first in R. v. Ahlers<sup>53</sup>, a case which concerned the German consul in Sunderland, a naturalised British subject. On 5th August 1914 he endeavoured to procure two German subjects to leave England for Germany there to enter the military service of Germany. The accused's defence was, first, that he did not know war had been declared (on which the jury found against him) and, secondly, that in assisting German subjects to return to their country, his intention was not in any way to injure England's interests but merely to carry out his duty as a consul in accordance with his instructions. In particular he said he thought that there was a rule of international law

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52. R. v. Bottrill, Ex parte Kuechenmeister [1947] K.B. 41; and see generally Halsbury's Laws of England (4th ed.), vol. 17 (Evidence) para. 106.

53. [1915] 1 K.B. 616.

which gave a margin of time to subjects of the country with whom we were at war to return home. That such a belief might have been reasonable was borne out by an Order in Council which allowed German subjects to depart without permits from certain approved ports up to 11th August. It was not left to the jury to decide whether the accused was actuated by the intention, and had the purpose, of aiding and comforting the King's enemies, and the appeal against conviction was allowed on that ground.

27. This case has been interpreted as introducing motive as a relevant factor in deciding criminal liability in treason,<sup>54</sup> and has been criticised on that account.<sup>55</sup> It would seem that the court accepted the appellant's contention that he believed his acts were lawful<sup>56</sup> and, in trying to mitigate the severity of the rule that ignorance of the law is no defence, the court found a basis for allowing the appeal by introducing the concept of motive. We believe

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54. "It cannot be doubted that his intention and purpose in doing the acts were material to the issue before the jury. Unless the jury were satisfied that his intention and purpose in acting as he did were evil, ..., and that he was intending to aid and comfort the King's enemies and did these acts with that object, they could not find him guilty of the act charged": per Lord Reading at p.625.
55. Smith and Hogan, Criminal Law (3rd ed., 1973), pp. 43-44; Professor Kenny, "Intention and Purpose", (1915) 31 L.Q.R. 299. Another special case arose in R. v. Steane [1947] K.B. 997, a prosecution under the Defence (General) Regulations 1939, in which the defendant was charged with broadcasting for the German Broadcasting Service with intent to assist the enemy. His defence was that he acted under pressure of severe personal violence and of threats to his family and with a view to saving his family from confinement in a concentration camp. It was held that in these circumstances the inference could not be drawn that the defendant intended the natural consequence of his act (namely assistance of the enemy) merely from the fact that he did it.
56. Previously in argument Lord Reading at p.622 said on behalf of the court "We are all of opinion that there was evidence on which a jury could find that the appellant knew of the declaration of war". Hence the only defence open to the appellant was that he believed his actions were lawful.

this was an unsatisfactory way in which to deal with the problem facing the court and think that some confusion has been allowed to develop in this area of the law. Perhaps this can best be illustrated by contrasting this judgment of Lord Reading with that in Casement's appeal where the motive argument was put and rejected.

28. The defence in R. v. Casement argued strenuously that Casement's motive in seeking to recruit British subjects who were prisoners of war in Germany to join an Irish Brigade to be equipped by Germany was to assist Ireland and not Germany. It was contended that the jury had to be satisfied that it was Casement's intention to use the Irish Brigade for the purpose of fighting Germany's battle against England.<sup>57</sup> Lord Reading in summing up to the jury explained that a man's intentions were to be gathered from his acts, and that he was presumed to intend the natural consequences of his acts; but ultimately it was for the jury to decide whether his intention had been to assist the enemy.<sup>58</sup>

Although the terms of the direction to the jury seem to imply that the presumption that a person intends the natural consequences of his acts is a rebuttable one, it certainly leaves no room for giving weight to motive as a factor that can override a person's intention as gathered from his acts.

29. These decisions must now be read in the light of the Criminal Justice Act 1967, section 8 of which provides -

"a court or jury, in determining whether a person has committed an offence, -

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57. See Trial of Roger Casement, Notable British Trials (1917) (ed. by G.H. Knott), p.160.

58. Ibid., at pp. 184-185.



- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

It follows that in regard to adhering to the King's enemies the present law requires an intention to aid an enemy contrary to the defendant's duty of allegiance, and that this intention is to be proved on a subjective basis.

(g) Overt act necessary

30. While the decisions of the courts extended the definition of treason, they have also tended to restrict the practical application of the definition by insisting that an overt act is a necessary element in the crime of treason. The words, "and thereof be proveably attainted of open deed [i.e. overt act] by the people of their condition" appearing after the definition of "being adherent to the King's enemies" have been held to apply to every category of treason.<sup>59</sup>

31. The nature of the overt act necessary to establish the offence of treason has been widely defined as "any act, measure, course or means whatever done, taken, used, or assented to, for the purpose of effecting a traitorous intention," and, more tersely, as "any act manifesting the criminal intention and tending towards the accomplishment of the criminal object."<sup>60</sup>

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59. Hale's Pleas of the Crown vol. 1, p.108.

60. Kenny's Outlines of Criminal Law (19th ed., 1966), p.396.

In Lord Preston's case<sup>61</sup> it was held that hiring a ship for the conveyance of treasonable papers to an enemy government was such an act; and the collecting of information for the use of the King's enemies, though never sent to them, amounts to a sufficient overt act,<sup>62</sup> as does a conspiracy to commit treason under the first category.<sup>63</sup> Spoken words may amount to a sufficient overt act if they are not simply loose words, spoken without relation to any act or project but help to carry forward, or are connected with, conduct which carries forward the intention they express.<sup>64</sup> It is uncertain whether the mere writing of words can amount to a sufficient overt act or whether publication is necessary.<sup>65</sup>

32. It will be seen from the last paragraph that the overt act necessary to constitute the actus reus of treason is not subject to any restrictions as to proximity or unequivocality such as delimit the actus reus required before an attempt at crime is established.<sup>66</sup> This is perhaps more clearly seen from the words of Lord Reading C.J., who said in his direction to the jury in R. v. Casement<sup>67</sup> -

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61. (1691) 12 St. Tr. 646.

62. R. v. Delamotte (1781) 22 St. Tr. 808.

63. R. v. Langhorn (1679) 7 St. Tr. (N.S.) 417 at p.463.

64. R. v. Charnoch (1694) 2 Salk.633. See also R. v. Despard (1830) 28 St. Tr. 346, where Lord Ellenborough C.J. stated that, if words are spoken at treasonable meetings held for the purpose of forwarding designs of a treasonable nature, and addressed to persons with an intent to excite or confirm them in treasonable measures, then such words are undoubtedly overt acts of treason.

65. See as to written words generally Kenny's Outlines of Criminal Law, (19th ed., 1966), p.397.

66. See Working Paper No. 50, "Inchoate Offences", paras. 68-73.

67. The Trial of Roger Casement, Notable British Trials (1926) (ed. by G.H. Knott), p.183.

"Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."

(h) Who can commit treason

33. As we have pointed out in paragraphs 12 and 13 above, the original basis of treason was the feudal allegiance owed by a vassal to his lord. Despite the various Treason Acts which lay down what conduct constitutes treason the important question of who owes allegiance to the Crown, and so can be held to be capable of committing treason, is determined by the common law. It is only a person who owes allegiance to the Crown who can commit treason. Thus when a charge of adultery was made in Parliament against Queen Caroline, consort of George IV, it was pointed out that the charge did not amount to a charge of treason. The adultery was alleged to have been committed abroad with an alien (Signor Bergami) and, since his conduct was not treason, there was no treason to which the Queen could be said to be a party.

34. The British Nationality Act 1948 and the decision of the House of Lords in the case of Joyce v. Director of Public Prosecutions<sup>68</sup> have produced somewhat complicated rules for deciding whether allegiance is owed or not. Those rules are stated with great clarity in Smith and Hogan's Criminal Law<sup>69</sup> and we do not think we can do better than cite in full the passage from their book -

"4 Who may commit Treason

The common law rule is that anyone who owes allegiance to the Crown at the time of the act may commit treason. It follows that:

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68. [1946] A.C. 347.

69. (3rd ed. 1973), at p.642. We are indebted to the authors for their permission to reproduce this passage.

(1) British subjects who are citizens of the United Kingdom and Colonies, who owe allegiance wherever they may be, may commit treason (under English law) in any part of the world.<sup>13</sup> A British subject cannot cast off his allegiance to the Crown in time of war by becoming a naturalised citizen of an enemy state. Indeed the act of becoming naturalised is itself an overt act of treason.<sup>14</sup>

(2) A British subject or a citizen of the Republic of Ireland who is not a citizen of the United Kingdom and Colonies may commit treason (under English law) only if the act be done in the United Kingdom or in any country of the Commonwealth which is not self-governing; unless he owes allegiance under the rules stated in 3(b) and 3(c) below. At common law, all British subjects were governed by the rule stated in paragraph 1, above; but now, by s.3 of the British Nationality Act 1948, a British subject who is not a citizen of the United Kingdom and Colonies is not guilty of an offence against English law by reason of anything done or omitted in a foreign country, or in any self-governing country of the Commonwealth<sup>15</sup> unless the act or omission would be an offence against English law if he were an alien acting in a foreign country. Since aliens may not commit treason unless they either are on British territory at the time of the act, or owe allegiance under 3(b) or 3(c) below, the position appears now to be as stated at the beginning of this paragraph.

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13. For an examination of the position in Rhodesia after the Unilateral Declaration of Independence, see [1966] Crim. L.R. 5 and 68.

14. Lynch [1903] 1 K.B. 444.

15. As specified in s.1(3) of the British Nationality Act 1948.

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If the facts of Casement<sup>16</sup> were to recur today D, not being a citizen of the United Kingdom and Colonies would not, prima facie, be guilty of treason because the acts done would not be an offence against English law if done by an alien in Germany. The position would be the same if the acts had been done, not in Germany, but in one of the independent countries of the Commonwealth, for example, Canada.

(3) An alien, even an alien enemy, may be guilty of treason if he has accepted the protection of the Crown, for this carries with it a correlative duty of allegiance. An alien is under the protection of the Crown:

(a) if he is voluntarily<sup>17</sup> on British territory (whether in one of the independent countries of the Commonwealth or not) at the time of the act, otherwise than as a foreign diplomatic representative or member of an invading or occupying force:<sup>18</sup> or

(b) if, having been within British territory, he leaves with a British passport which he still possesses at the time of the treasonable act.

Proposition (b) is the ratio decidendi of Joyce v. Director of Public Prosecutions<sup>19</sup> where it was held immaterial that D obtained the passport by false pretences. The basis of the decision is that by possession of the passport, D was enabled to obtain in

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16. [1917] 1 K.B. 98.

17. It is assumed that a prisoner-of-war on British territory could not commit treason.

18. Such an alien's duty of allegiance does not cease merely because the protection of the Crown is temporarily withdrawn owing to the occupation by the enemy of the area in which the alien resides: De Jager v. A.-G. of Natal, [1907] A.C. 326.

19. [1946] A.C. 347; [1946] 1 All E.R. 186. And see Re P. (G.E.) (an infant), [1964] 3 All E.R. 977.

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a foreign country the protection extended to British subjects: and, therefore, that he owed a corresponding duty of allegiance. It was immaterial that he had never availed himself, and had no intention of availing himself, of the protection of the Crown. If he had surrendered the passport or taken any overt step (other than the act of treason itself) to withdraw his allegiance, this would have been effective; but there was no evidence that he had done so.<sup>20</sup>

(c) Where an alien after residing in British territory, goes abroad without a British passport, but leaving behind a family and "effects", his duty of allegiance may continue so long as his family and effects remain under the protection of the Crown. According to Foster<sup>21</sup> it was so resolved by an assembly of all the judges in 1707, and he and other writers of authority<sup>22</sup> accept this as law. The resolution, being made extra-judicially, was in no sense a binding precedent,<sup>23</sup> but, having been emphatically approved by the House of Lords in Joyce, it must probably be accepted as law. But its extent is uncertain.

'Does 'family' mean wife or children or both?'<sup>24</sup>  
Does the term include a wife living apart from her husband by judicial or voluntary separation?

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20. Lord Porter dissented on the ground that the jury had not been properly directed that they must be satisfied that the passport remained in Joyce's possession at the relevant date.

21. Crown Law, 185.

22. Hawkins, 1 P.C., c.2 s.5; East, 1 P.C. 52; Chitty on the Prerogatives of the Crown, 12, 13; Holdsworth in Halsbury (2nd ed.), Vol. 6, 146, n.(t).

23. Entick v. Carrington (1765), 19 State Tr. 1029 at p.1071, per Lord Camden.

24. Lord Jowitt said he regarded parents or brothers or sisters as a family for this purpose: [1946] A.C. at p.368.

At what age, if any, do children cease to belong to the family?'<sup>25</sup>

The resolution seems to have been limited to the case where D had himself been in British territory and it could very reasonably be limited to that where D has his home in the realm at the time of the act.<sup>26</sup>

Joyce has been severely criticised.<sup>27</sup> Joyce had no right to protection while abroad; there was, at most, a possibility that he might have obtained protection through the passport. This makes the capital offence turn on the merest technicality.<sup>28</sup>

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25. Williams (1948), 10 C.L.J. at 62. See Re P (G.E.) (an infant), [1964] 3 All E.R. 977.

26. Cf. Pitt Cobbett's Cases on International Law (6th ed.), 199, 200.

27. Biggs 'Treason and the Trial of William Joyce' (1947), 7 Toronto L.J. 162; Williams, 'The Correlation of Allegiance and Protection' (1948) 10 C.L.J. 54; Pitt Cobbett, loc. cit.

28. On the position of British Protected Persons, see Williams, op. cit. and cf. Re Mwenya, [1960] 1 Q.B. 241; [1959] 3 All E.R. 525."

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(i) Punishment for treason

35. The mandatory punishment for treason is death by hanging.<sup>70</sup> Further, the common law rule which permits executions to take place in public still holds for treason.<sup>71</sup>

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70. Treason Act 1814, s.1. Sect. 2 of the Act which gave the Crown power to order execution by beheading was repealed by the Statute Law (Repeals) Act 1973.

71. Sect.2 of the Capital Punishment Amendment Act 1868, which requires executions to be within a prison, only applies to murder.

(j) Limitation

36. Prosecution for treason committed in the United Kingdom must be brought within three years from the time when the offence is committed.<sup>72</sup> This limitation does not, however, apply to "designing, endeavouring or attempting any assassination on the body of the King."<sup>73</sup> Nor does it apply to treasons committed abroad or on the high seas.

(k) Procedure

37. There were originally certain special rules of procedure and evidence applicable to treason trials, particularly in regard to the quantum of evidence required. These were gradually whittled away and it is now provided<sup>74</sup> for England and Wales that the procedure on trials for treason or misprision of treason shall be "the same as the procedure on trials for murder".

2. Treason felony

38. The Treason Act 1795 expressly recognised as treason compassing or intending the death, destruction, wounding or imprisonment of the Sovereign where this was manifested by any overt act.<sup>75</sup>

39. The Treason Felony Act 1848, section 3, makes it an offence to compass, imagine, invent, devise or intend -

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72. Treason Act 1695, s.5.

73. Ibid., s.6.

74. Criminal Law Act 1967, s.12(6), which repealed the Treason Acts of 1800 and 1945, replacing them with a comprehensive provision.

75. See para. 13, above.



- (a) to deprive or depose the Sovereign from the style, honour or royal name of the imperial crown,
- (b) to levy war against the Sovereign in order to compel the Sovereign to change her measures or counsels or to intimidate or overawe either House of Parliament, or
- (c) to move or stir any foreigner with force to invade the United Kingdom or any of the Sovereign's dominions or countries under the obeisance of the Sovereign,

and to express, utter or declare such by any overt act or deed. The maximum penalty for the offences under this Act is imprisonment for life.

40. The 1848 Act specifically provided that nothing in it should "lessen the force of or in any manner affect anything enacted by the Treason Act 1351", and the conduct penalised by the Act can, therefore, still be charged as treason.<sup>76</sup> The effect of the Act was to avoid the procedural difficulties attendant upon a trial for treason and also the mandatory death sentence.

### 3. Misprision of treason

41. Misprision of treason is a common law offence specifically retained by the Criminal Law Act 1967 which, by abolishing the distinction between felonies and misdemeanours, abolished also the offence of misprision of felony. Misprision of treason is committed when a person knows that another has committed treason and omits to disclose this information or any material part of it to the proper authority within

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76. Mulcahy v. R. (1868) L.R. 3 H.L. 306, 320, and see generally Kenny's Outlines of Criminal Law (19th ed., 1966), p.404. See also Smith and Hogan, Criminal Law (3rd ed., 1973), p.646.

a reasonable time. There is no modern authority<sup>77</sup> which specifically deals with misprision of treason but in 1961 the House of Lords gave detailed consideration to the offence of misprision of felony<sup>78</sup> and it is probable that the same general principles as were held to apply to that offence would also be held to apply to misprision of treason. It would seem, therefore, that the accused must actually know that a treason has been committed by someone else and he must have concealed or kept secret his knowledge when there was a reasonable opportunity for him to inform the authorities. It is his duty to disclose all material facts known to him, a duty which is not discharged merely by reporting the bare fact that treason had been committed.

42. In Sykes v. Director of Public Prosecutions<sup>79</sup> Lord Denning said that non-disclosure might sometimes be justified or excused on the ground of privilege but it is, we think, very doubtful whether any relationship would be held to justify non-disclosure of so serious an offence as treason on the ground of privilege. The House of Lords left open the question whether it would be the crime of misprision not to report a contemplated felony.

#### 4. Compounding treason

43. By the Criminal Law Act 1967,<sup>80</sup> new statutory offences were enacted to take the place of the old common law offences of compounding a felony and (perhaps) a misdemeanour.

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77. The last reported case is R. v. Thistlewood (Cato St. conspiracy) (1820) 33 St. Tr. 681.

78. Sykes v. Director of Public Prosecutions [1961] A.C. 528.

79. Ibid., at p.564.

80. Sect. 5(1).

The compounding of treason, however, was not abolished,<sup>81</sup> and the common law offence of compounding treason therefore remains. This offence is committed by anyone who agrees for value to abstain from prosecuting the offender who has committed treason.<sup>82</sup>

#### 5. Treason Act 1842

44. In 1842 it was made an offence to make attacks upon or cause annoyance to the Sovereign by conduct which would not in most cases amount to treason. The offences specified in section 2 of the Treason Act 1842 are -

(1) Wilfully to discharge or attempt to discharge, or point, aim, or present at or near to the person of the Sovereign, any gun, pistol, or any other description of firearms, or of other arms whatsoever whether the same shall or shall not contain any explosive or destructive material, or to discharge or cause to be discharged (or to attempt the same) any explosive substance or material near to the person of the Sovereign.

(2) Wilfully to strike or strike at, or attempt to strike or strike at the person of the Sovereign, with any offensive weapon, or in any other manner whatsoever.

(3) Wilfully to throw or attempt to throw any substance, matter or thing whatsoever, at or upon the person of the Sovereign.

[But in all the above cases there must either be (a) an intent to break the public peace or to injure or alarm the Sovereign or (b) circumstances such that the public peace may be thereby endangered.]

(4) Wilfully to produce or have near the person of the Sovereign any gun, pistol or any other description of firearms, or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure or alarm the Sovereign.

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81. Sect. 5(5).

82. See para. 6, above.

The maximum punishment for these offences is imprisonment for seven years.

6. Treachery Act 1940

45. The Treachery Act 1940 created a new capital offence of treachery. Section 1 read -

"If, with intent to help the enemy, any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of felony and shall on conviction suffer death."

In introducing the Bill<sup>83</sup> the Home Secretary stated that conduct which came within the Act would amount to treason. He gave two reasons why this new offence was needed. First, it applied to aliens who, having come to this country in a clandestine way for a hostile purpose, would not be caught by the doctrine of local allegiance because of their residence in this country. Secondly, the Act provided for trial by the ordinary procedure of the courts or courts-martial instead of the then cumbersome procedure prescribed by the Treason Acts. The Act provided that no one should be guilty of an offence by reason of anything done after the state of emergency was ended.<sup>84</sup> The intent necessary for the commission of an offence under this Act is probably of the same strict kind as we have seen applies in cases of treason.<sup>85</sup> The act necessary to constitute this offence is perhaps more narrowly circumscribed than that necessary to amount to aiding and comforting the enemy under the Treason

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83. Hansard (H.C.) 22 May 1940, vol. 361, col. 185.

84. The Act was finally repealed for England by the Criminal Law Act 1967, s.13 and Sched. 3, Pt.1.

85. R. v. O'Grady (1941) 28 Cr. App. R. 35. See para. 29, above.

Act 1351.<sup>86</sup> The Treachery Act was brought into being for the duration of the war emergency,<sup>87</sup> which ended formally on 24th February 1946.<sup>88</sup>

#### Persons to whom Treachery Act applied

46. The persons to whom the Treachery Act applied were defined in the Act with precision and without reference to allegiance. The act applied to anything done by a British subject anywhere save in a Dominion, or in India, Burma or Southern Rhodesia; to anyone subject to the Naval Discipline Act, to military law or to the Air Force Act, anywhere; and to anything done by any person (that is, including an enemy alien) in the United Kingdom, or in any British ship or aircraft other than a Dominion ship or aircraft.<sup>89</sup>

#### 7. Statistics

47. Apart from cases in wartime, we know of no modern instance of prosecution in English courts for the offence of treason. The Director of Public Prosecutions, to whom we are greatly indebted, has given us the results of a survey by his research division of cases referred to his Department from 1956 to 1974, which could be described as being aimed against the State. The only case where a charge of treason felony was preferred involved three members of an organisation who were in England in 1972

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86. See para. 23, above.

87. The Treachery Act 1940, s.6.

88. See Treachery Act (End of Emergency) Order 1946, S.R.&O. 1946 No. 893 art. 2.

89. Treachery Act 1940, s.4. Acts of treachery by members of the armed forces are now made offences by the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957.

openly recruiting volunteers to go to Northern Ireland to take up arms in support of the Catholics in the event of civil war or widespread sectarian violence. They were charged with treason felony, seditious conspiracy, uttering seditious words and taking part in the management of an association contrary to the Public Order Act 1936. In the result the counts relating to treason felony and seditious conspiracy were not proceeded with and the three defendants were given suspended sentences for uttering seditious words and for the offence against the Public Order Act. In one instance concerned with the distribution of a leaflet at the time of the Suez crisis in 1956 the appropriateness of a charge of treason was considered and rejected. It is apparent from the information supplied by the Director that since 1956 it has not been thought necessary to call in aid either treason or treason felony to deal with conduct directed against public order.

B. Proposals for reform of treason

1. Introductory

48. Two categories of treason as detailed in paragraph 13, namely violating certain royal ladies and slaying the Chancellor, Treasurer or the King's justices in their places doing their offices would appear to have no place in the modern law. Indeed, there has been no Treasurer since 1714,<sup>90</sup> and since the time of Henry VIII there has been no instance of treason being invoked to deal with the violation of a royal lady. It is our provisional view that there is no need for any offence, other than murder, to deal with the killing of the above officials. It is also our provisional

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90. Halsbury's Laws of England (4th ed.), Vol. 11, para. 811.

view that there is no need for the retention of any treason-type offence to deal with violation of the royal ladies.

49. This leaves the way clear to a consideration of the main categories of treason, namely compassing the death of the Sovereign, levying war and adhering to the King's enemies. We propose to deal with these by treating first the question of treason in wartime, secondly the question of treason in peacetime and whether such an offence is required, and finally the question of special protection for the Sovereign.

50. We must reiterate here that we have not been asked to consider the appropriateness of the death penalty for treason. We assume, however, that treason will continue to be a most serious offence carrying a mandatory penalty. This we bear in mind when considering whether offences should be brought within the ambit of treason proper.

## 2. Need for reform

51. The account we have given of the present law, based upon a mediaeval statute and the extensive interpretations of it, and the subsequent Acts which have created separate but overlapping offences, at once makes apparent not only that a restatement of the law is required, but also at least some reform.

## 3. Offences of endangering the State in time of war

52. The most important form of treason is that which concerns acts of disloyalty in time of war.<sup>91</sup> To the man

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91. That is in the strict sense in which it is regarded by international law, Kenny's Outlines of Criminal Law (19th ed., 1966), p. 339.

in the street a traitor is someone who helps his country's enemies. During the last war, as we have seen, an additional capital offence of treachery was created, largely because of the procedural difficulties involved in a treason trial. The procedural difficulties of treason have gone, but the precise definition of the classes of person to whom the Treachery Act 1940 applied was a significant improvement on the less clearly defined class of person, based on the concept of allegiance, to whom the Treason Act 1351 applies. It is our provisional view that there should be an offence of treason which lays down with precision the persons to whom it applies and the conduct necessary to constitute it, which should apply during the existence of a state of war.

53. If the earlier Treason Acts, which embody the wide offence of treason, are to disappear, the conduct to be penalised by an offence of endangering the State in time of war will have to be wider than that which was covered by the Treachery Act 1940. It is our provisional view that it should be an offence of treason for a person (to whom the offence applies), with intent to help any enemy with whom this country is at war, to do any act which is likely to help the enemy, or, with like intent, to do any act which is likely to hinder the prosecution of the war by this country.

54. We think that any new definition of treason should make it clear to whom it is to apply. It is our provisional view that the offence should apply to -

- (a) any British subject who is a citizen of the United Kingdom and Colonies in respect of any act of treason anywhere, and
- (b) any person, including an enemy alien, who is voluntarily in the United Kingdom or in any Colony or dependent territory of the United Kingdom, in respect of any act of treason in the United Kingdom or in such Colony or



territory but excluding any foreign diplomatic representative or a member of an invading or occupying force.

55. The intent required for the offence should be an intent to help an enemy, and this requires knowledge of the fact that the help is given to an enemy. A person who, for example, is living on a remote island and does not know war has broken out would not have the required intent to aid the enemy. We shall deal with the normal rule in regard to intention in criminal offences in our Report on the Mental Element in Crime. In Working Paper No. 31 on this subject it was proposed that a person was to be taken to intend a consequence of a given description to result from his conduct, if, but only if, either he actually intended it or had no substantial doubt that it would result from his conduct. Our final recommendations are unlikely to depart substantially from this formulation.

56. Some qualification may, however, be required to meet the type of situation that arose in R. v. Ahlers,<sup>92</sup> or which may arise where it is not contrary to the person's duty to give assistance to the enemy. An example which at once comes to mind is the work done by prisoners of war, which may be required of them under international convention. We feel that there should be a requirement not only of help to the enemy, but also that there should be no lawful excuse for giving the help. So far as duress is concerned we have proposed in Working Paper No. 55 on Defences of General Application that this should be a defence available in the case of treason. Our final recommendation is likely to follow this proposal.

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92. [1915] 1 K.B. 616; see para. 26, above.

#### 4. Acts against the State in peacetime

57. Acts against the State in peacetime are covered under the present law under various heads of treason. The conduct may amount to compassing the death of the Sovereign on the basis that, as interpreted, this includes the Sovereign's political death, or it may amount to levying war. The Treason Felony Act 1848 is particularly aimed at treasonable activity in peacetime and covers, as we have pointed out in paragraph 39, a wide variety of conduct. In addition, of course, conduct which falls within these offences will almost invariably constitute at least one of a wide variety of other serious offences including riot, unlawful assembly, false imprisonment, offences against the person and offences of damage to property, and their planning will amount to conspiracy to commit these offences. It is because of the extent of the present offences of treason in peacetime and because of the difficult language in which they are cast that it is in our view necessary at least to restate the offences in simple language. This necessarily raises the question of the width of such offences, and leads to the question of whether they are, indeed, needed at all.

58. A strong practical argument against retaining an offence of treason in peacetime is that the criminal law provides, as we have seen in the previous paragraph, an adequate armoury of serious offences with which to charge offenders who execute or plan acts which might otherwise be punishable as treason in peacetime. The information we have had from the Director of Public Prosecutions, as well as the almost entire absence of cases in this century, shows that it has not been thought necessary to rely upon any offence of treason. In the only peacetime case since 1956 where treason felony was charged it was not proceeded with. In addition it seems that from the practical point of view it is normally found more expedient to charge ordinary

criminal offences than to imply that importance is attached to the activities by treating them as treasonable, or that there could be any political justification for the conduct, even in the mind of the offenders.

59. The contrary argument is that the State should treat as the most serious offence in its criminal law any conduct aimed at the overthrow by illegal means of the constitutional system under which it is governed. This is not so much a question necessarily of providing an offence with a greater penalty than any other offence as of having an offence which will be regarded by the ordinary person as the most reprehensible of offences. If there is a general intention to overthrow the constitutional system it should, on this argument, be punished not merely through the individual offences of murder, riot, unlawful assembly or criminal damage, but as an offence against the State.

60. Many countries have offences of treason or their equivalent which apply in peacetime. Canada<sup>93</sup> and New Zealand<sup>94</sup> each provide that it is treason to use force for the purpose of overthrowing the government of the country, (and in the case of Canada of a province) or to conspire so to do. Australia distinguishes between treason and treachery (depending upon whether the acts occur in peacetime or wartime), and provides that it is treachery by any act to (i) overthrow the Constitution of the Commonwealth by revolution or sabotage, or (ii) overthrow by force or violence the established government of the Commonwealth or of a State.<sup>95</sup> In America the Proposed New Federal Criminal Code<sup>96</sup> proposed an offence of armed insurrection with

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93. Criminal Code 1954-1966, s. 46(1)(d) and (f).

94. Crimes Act 1961, s. 73(e) and (f).

95. Crimes Act 1914-1966, s. 24 and s. 24AA(1).

96. Final Report of the National Commission on Reform of Federal Criminal Laws (1971), s. 1103.

intent to overthrow, supplant or change the form of the government of the United States or of a state.

61. We would, of course, not think it right to propose that the power of the criminal law to punish conduct aimed at illegally supplanting, or changing the form, of government in this country should be so restricted as to allow such serious conduct to go unpunished. It is, however, difficult to postulate a conspiracy illegally to overthrow or supplant constitutional government, without the use of force; there would, therefore, also be a conspiracy to commit serious offences<sup>97</sup>, which would be punishable with heavy penalties. Nevertheless, we think that there may be virtue in retaining an offence specifically dealing with such conduct in terms of treason or the like in order to emphasise the particularly reprehensible character of the conduct. Our provisional view is that conduct of this kind, even though it would necessarily involve the commission of other serious offences, needs to be a separate offence, and that there should be a specific offence applicable in peacetime to penalise conduct aimed at the overthrow, or supplanting, by force, of constitutional government.

#### 5. Protection of the Sovereign

62. The next question which has to be considered is whether treason is the appropriate offence by which to penalise invasions of the personal security of the Sovereign as under the Treason Act 1351 and the Treason Act 1795. It can be argued that, because the stability of the State is unlikely to be affected today by the killing of the Sovereign in the same way as it would have been

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97. For example, damage to property contrary to s. 1 (2) of the Criminal Damage Act 1971, or causing an explosion contrary to s.3 of the Explosive Substances Act 1883.

before the Sovereign's personal powers were limited by constitutional conventions, there is no longer any need to treat the killing of the Sovereign as treason of itself. If done in wartime with the intention of aiding the enemy this would be treason. If there were to be a peacetime offence of the kind referred to in paragraph 61, above, it would be within that offence if done with the prescribed intent. If there were no such offence then the intentional killing of the Sovereign would be murder. Other assaults upon the Sovereign are now offences under the Treason Act 1842, carrying a maximum sentence of seven years' imprisonment.

63. On the other hand it can be argued that the constitutional significance of the Sovereign is such that, coupled with the accepted duty of the Sovereign to be seen among the people, carrying with it constant exposure to the risk of injury, there should be separate offences of murdering or intentionally injuring the Sovereign.

64. The Treason Act of 1842<sup>98</sup> contains a number of offences penalising a wide range of conduct such as discharging, aiming or even presenting a firearm at or near the Sovereign, striking or striking at the Sovereign, or throwing or attempting to throw anything at the Sovereign. In each case the conduct must be "wilful" and there must be an intent either to break the public peace or to injure or alarm the Sovereign, or the circumstances must be such that the public peace may be endangered. Finally, it is an offence wilfully to have near the Sovereign any arms, explosive or dangerous thing with intent to use them to injure or alarm the Sovereign. All these offences carry a maximum sentence of seven years' imprisonment. We do not

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98. See para. 44, above.

know of any cases in recent years where it has been necessary to rely on these offences,<sup>99</sup> and it can be argued that there is no need to make special provision for conduct of this nature, having regard to existing offences such as the unlawful possession of firearms, explosives and offensive weapons.

65. Our provisional view is that invasions of the personal security of the Sovereign should be made specific offences without being declared to be treason. There should be two serious offences, one of murdering, the other of intentionally injuring, the Sovereign, to replace the offences in the Treason Act 1795. As we are not to consider the question of the death penalty, we are not consulting upon the question of penalty for these proposed offences. We assume that the penalties will mark the extreme gravity of such offences. In addition there should be new legislation to replace in simpler terms the lesser offences in the 1842 Act. At this stage we do no more than propose the outline of such a new offence, which should penalise having near the person of the Sovereign any explosive, weapon or other thing with intent to use it to injure or alarm the Sovereign. The offence should carry an appropriate penalty.

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99. The most recent use of the Act was in September 1936 when a defendant was convicted at the Central Criminal Court and sentenced to twelve months' imprisonment for contravening s.2, in that he produced or had a revolver near to the person of the King with intent to alarm His Majesty. On an alternative count of presenting near the person of the King a revolver with intent to break the public peace, or whereby the public peace might have been endangered, and with intent to alarm His Majesty the defendant was acquitted, as also on a count of possessing a firearm and ammunition with intent to endanger life.

66. It is also our provisional view that such offences should cover the Sovereign's consort and the heir to the Throne (whether the heir apparent or the heir presumptive). We do not think that these provisions need extend to other members of the Royal Family.

#### 6. Misprision of treason

67. With the codification of the law of treason, it follows that the common law offence of misprision of treason should also be abolished. Whether it is replaced by a statutory offence to be included in the legislation depends upon whether the conduct which constitutes misprision should continue to be an offence. The conduct constituting treason in time of war may have very serious consequences and to suppress knowledge that the offence has been committed or is about to be committed may in itself contribute to the likelihood of the consequences occurring. It is our provisional view that it should be an offence to suppress such knowledge, certainly in relation to the offence of treason in wartime proposed in paragraph 53 above. It may be thought desirable to retain the equivalent offence in respect of the offence proposed in paragraph 61 above, to penalise conduct aimed at the overthrow of constitutional government by force; we seek views on this. We do not think that there is any need to retain an offence of compounding treason.

## PART III: SEDITION

### A. The Present Law

#### 1. Introduction

68. There is probably no offence properly described as "sedition" in English law, but -

- (1) the oral or written publication of words with a seditious intention,<sup>100</sup> and
- (2) an agreement to further a seditious intention by doing any act,

have always been common law offences.<sup>101</sup> As with many common law offences, when one penetrates back in history beyond the nineteenth century text-book formulations one finds a confusing lack of differentiation between various offences. In the case of crimes of sedition one also finds that prosecutions were usually brought with overtly political motives. For our purpose, which is to consider what place, if any, crimes of sedition should occupy in a modern criminal code, we think it sufficient to start with the definition of seditious intention proposed by Sir James Stephen in his Digest.

#### 2. Elements of sedition

69. Stephen's definition of seditious intention was accepted as accurate by the Criminal Code Commissioners and by Cave J., in his direction to the jury in R. v. Burns.<sup>102</sup>

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100. In the case of written words this is seditious libel.

101. See Smith and Hogan, Criminal Law (3rd ed., 1973), at p. 646.

102. (1886) 16 Cox C.C. 335, 360.



Article 114 in Stephen's Digest of the Criminal Law  
reads<sup>103</sup> -

A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, His Majesty, his heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, [or to incite any person to commit any crime in disturbance of the peace,] or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.

An intention to show that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention.

(a) Intention to cause violence

70. It is clear that there is a qualification to the rules as stated by Stephen. It is not sufficient merely to show that the words were used with the intention of achieving one of the objects set out in Article 114; it must also be proved that there was an intention to cause violence.<sup>104</sup> Indeed, Stephen himself in his History of the

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103. The words in brackets were added in the 4th edition. They did not appear in the Article approved by the Criminal Law Commissioners and by Cave J. in Burns, n.102, above.

104. R. v. Collins (1839) 9 C. & P.456,461, per Littledale J.; R. v. Burns (1886) 16 Cox C.C.355,367; R. v. Aldred (1909) 22 Cox C.C.1,4, per Coleridge J.

Criminal Law of England accepts that nothing short of a direct incitement to disorder and violence is a seditious libel.<sup>105</sup> He states that the modern view of the law is plainly and fully set out by Littledale J. in Collins. In that case the jury were instructed that they could convict of seditious libel only if they were satisfied that the defendant "meant that the people should make use of physical force as their own resource to obtain justice, and meant to excite the people to take the power into their own hands, and meant to excite them to tumult and disorder." These views are cited with approval in the Canadian case of Boucher v. R.,<sup>106</sup> although the case itself did not turn upon the question of whether there was an incitement to actual violence.

(b) Intention to disturb constituted authority

71. The most careful analysis which has been given to the law of sedition in recent years is in the judgments of the Supreme Court of Canada in Boucher v. R.<sup>107</sup> The Court held that "the seditious intention upon which a prosecution for the seditious libel must be founded is an intention to incite violence or to create public disturbance or disorder against His Majesty or the institutions of Government. Proof of an intention to promote feelings of ill-will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of incitement to violence in this connection, but it must be violence or defiance for the purpose of disturbing constituted authority." The subject of the charge in this case was a pamphlet issued by a group of Jehovah's Witnesses, attacking the police, public officials and Roman Catholic

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105. (1883), vol.II, pp.375,381.

106. [1951] 2 D.L.R.369,382-4.

107. Supra.

clergy on the grounds that they persecuted members of the sect, and alleging that the clergy unjustifiably influenced the courts and the administration of justice against them.

72. If this statement of the law is correct it would seem that a case such as R. v. Leese<sup>108</sup> could not be made the subject of a charge of sedition. In that case the printers and publishers of a newspaper were charged with seditious libel in that they published a paper containing statements reflecting upon the Jewish Community as a whole, on which charge they were acquitted. There was a similar prosecution in 1947 of a newspaper editor who had written an article in strong terms assailing British Jews and complaining of their alleged black market activities, at a time when Palestinian Jews were attacking British soldiers in Palestine. The article went so far as to suggest that violence might be the only way to bring the British Jews to a sense of their responsibility to the country in which they lived. In this case, too, the defendant was acquitted.<sup>109</sup> Publications such as these might well now constitute offences under the Race Relations Act 1965, or under the 1976 Act when it is brought into operation.

73. It seems to us that it is most unlikely that the courts would now adopt any definition of sedition which goes wider than that expressed in Boucher v. R.<sup>110</sup> If this is correct it follows that before a person can be convicted of publishing seditious words, of seditious libel, or of seditious conspiracy he must be shown to have intended to incite to violence, or to public disorder or disturbance, with the intention of disturbing constituted authority.

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108. The Times, 19 and 22 September 1936. The defendants were also charged with public mischief, on which count they were convicted. As to public mischief see para. 74, below.

109. See Street, Freedom, the Individual and the Law (3rd ed.) Penguin Books at p.203.

110. See para.71, above.

### 3. Public mischief and sedition

74. In R. v. Leese<sup>111</sup> the defendants, in addition to the charge of sedition, also faced a charge of public mischief upon which they were convicted. In Joshua v. R.<sup>112</sup> the defendant was likewise charged with both sedition and public mischief (in the Windward and Leeward Islands). The Privy Council, on appeal, condemned the practice of trying a prisoner for both sedition and for causing a public mischief by making the seditious speech. They left open the question of whether there was any separate crime of effecting a public mischief, apart from cases of conspiracy. The House of Lords has now decided that there is no common law offence of public mischief.<sup>113</sup>

### 4. The nature of the intention required

75. There is considerable doubt on the authorities as to the nature of the intention required in sedition. Opinions range from the extreme objective test, which requires only proof that there was an intention to publish the words that were published -

"In determining whether the intention ... was or was not seditious, every person must be deemed to intend the consequences which would naturally flow from his conduct ..."<sup>114</sup>

to the extreme subjective test enunciated in R. v. Steane<sup>115</sup> under which nothing less than a desire to cause the disorder, etc. would suffice. We do not think that for our purposes it is necessary to give detailed consideration to the various conflicting authorities. They are clearly set out

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111. See para.72, above, and n.108.

112. [1955] 1 All E.R. 22.

113. Withers v. D.P.P. [1975] A.C. 842.

114. Stephen's Digest of the Criminal Law (9th ed., 1950), art. 115.

115. [1947] K.B. 997.

in Smith and Hogan's Criminal Law.<sup>116</sup> If there is to be any crime of sedition in the criminal code we think it is clear that the mental element must be one of intention as eventually defined for the whole code.<sup>117</sup>

B. Proposals for reform of sedition

76. The main question we must ask is whether there is any need for a crime or crimes of sedition in a criminal code. This necessitates considering whether there is any conduct which ought to be penalised but which would go unpunished if there were no such crimes in the code. The published criminal statistics do not treat sedition as a separate class of offence, but the information we have had from the Director of Public Prosecutions<sup>118</sup> shows that in the last fifteen years there has been only one instance of proceedings being brought for sedition. In that case there were, in fact, other offences of which the defendants were convicted. There are a number of statutory offences which we shall have to consider in this general review of offences against the State or in a later review of public order offences but, for the reasons which appear in the next paragraph, we do not think that a full examination of these offences is necessary to enable us to answer the question postulated above.

77. It seems to us most unlikely that the courts would adopt any definition of sedition which goes wider than that expressed in Boucher v. R.<sup>119</sup> If this is correct, it follows that before a person can be convicted of publishing seditious words, or a seditious libel or of seditious conspiracy he

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116. (3rd ed.) at pp.647-648.

117. See Working Paper No. 31, "The Mental Element in Crime!"

118. See para. 47, above.

119. [1951] 2 D.L.R. 369.

must be shown to have intended to incite to violence, or to public disorder or disturbance, with the intention thereby of disturbing constituted authority. In order to satisfy such a test it would, therefore, have to be shown that the defendant had incited or conspired to commit either offences against the person, or offences against property or urged others to riot or to assemble unlawfully. He would, therefore, be guilty, depending on the circumstances, of incitement or conspiracy to commit the appropriate offence or offences.

78. At present both incitement and conspiracy to commit any offence, whether a common law offence or a statutory offence with a maximum penalty, carry a penalty of imprisonment and a fine entirely at the discretion of the court. Clause 3 of the Criminal Law Bill now before Parliament is designed to limit the penalty for conspiracy to commit an indictable offence to the penalty available for that offence, and in Working Paper No.50<sup>120</sup> we have proposed that the penalty for incitement should be similarly limited. Even with such limitations we do not think that in the present context the penalties available would be insufficient. These would be life imprisonment if there was incitement or conspiracy to contravene section 18 of the Offences against the Person Act 1861, or section 1(2) or (3) of the Criminal Damage Act 1971, or to commit the common law offence of riot or unlawful assembly; imprisonment for 10 years if there was incitement or conspiracy to contravene section 1(1)

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120. Inchoate Offences: Conspiracy, Attempt and Incitement, para. 114.

of the Criminal Damage Act, and for 5 years if there was incitement or conspiracy to contravene section 20 of the Offences against the Person Act. Apart from the consideration that there is likely to be a sufficient range of other offences covering conduct amounting to sedition, we think that it is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is "political". Our provisional view, therefore, is that there is no need for an offence of sedition in the criminal code.

PART IV: OFFENCES OF SUBVERTING THE FORCES  
AND THE LIKE

A. The Present Law

1. General

79. There are a number of offences created by statute which protect the armed forces and the police from attempts to subvert their allegiance or persuade them into breaches of duty. The statutes with which we are directly concerned in this paper are the Incitement to Mutiny Act 1797, the Incitement to Disaffection Act 1934, the Police Act 1964 and the Aliens Restriction (Amendment) Act 1919. In addition, the armed forces' own Acts<sup>121</sup> create a number of offences of this nature relating to military matters which apply to persons generally and are punishable by the civil courts. We are not concerned with these latter offences save insofar as they may overlap with and perhaps render unnecessary any offence which is our direct concern.

2. Incitement to Mutiny Act 1797

80. Prior to the Royal Navy mutiny at the Nore in 1797 incitement to mutiny in the armed forces was not an offence. The Incitement to Mutiny Act 1797 remedied this gap in the law. The Act made it a felony<sup>122</sup> "maliciously and advisedly (to) endeavour to seduce any person or persons serving in His Majesty's forces by sea or land from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to

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121. Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957.

122. The distinction between felony and misdemeanour was abolished by the Criminal Law Act 1967.



endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever". The Act was allowed to lapse in 1805 but was revived in 1817 and remains in force so far as the offence set out above is concerned. At first punishable by death, the offence now carries a maximum of life imprisonment. The word "advisedly" means "knowingly" and it is therefore necessary to show that the defendant knew that the person he was addressing was a member of the armed forces.<sup>123</sup> It is to be noted that the endeavour must be to seduce from "duty and allegiance", which would appear to mean an endeavour to induce a state of disaffection towards the State. There have been no prosecutions under this Act for very many years.

### 3. Incitement to Disaffection Act 1934

81. The Incitement to Disaffection Act 1934 provides for two offences -

- (1) maliciously and advisedly endeavouring to seduce any member of His Majesty's forces from his duty or allegiance to His Majesty (section 1);
- (2) with intent to commit or to aid, abet, counsel or procure the commission of an offence under section 1, having in one's possession or under one's control any document of such a nature that the dissemination of copies thereof among members of His Majesty's forces would constitute such an offence (section 2(1)).

These offences carry maximum penalties of 2 years' imprisonment and a £200 fine on indictment, and 4 months' imprisonment and a £20 fine on summary conviction. The Act also contains in section 2(2) a power of search of specified premises under warrant issued by a High Court judge on his

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123. R. v. Fuller (1797) 2 Leach 790.

being satisfied by information on oath from a police inspector that there is reasonable ground for suspecting that there is on the premises evidence of the commission of an offence under the Act.

82. The Bill aroused controversy, which is reflected in the debates during its passage through Parliament. Although there seems to have been some indication at the time that many leaflets likely to cause disaffection among the forces had been printed and distributed, it was asserted by the Government of the day that the Act was not a panic measure, but merely a means of bringing persons to trial for endeavouring to seduce the forces without having to rely on the Incitement to Mutiny Act 1797, which necessitated trial on indictment in every case with a maximum penalty of life imprisonment.

83. The main controversies centred upon -

- (1) the words "duty or allegiance" used in section 1 instead of "duty and allegiance" used in the 1797 Act, and
- (2) the powers of search and seizure.

It was stressed in debate by those opposed to the measure that the use of the word "or" rather than "and" in section 1 considerably widened the scope of the proscribed conduct,<sup>124</sup> and indeed created an entirely new offence. It was pointed out that a wife who persuaded her soldier husband to overstay his leave by a day or so could not be said to have endeavoured to seduce him from his duty and allegiance to the Sovereign, and would not, therefore, have been guilty of an offence under the 1797 Act, although, so it was argued, she might well be guilty of an offence under the 1934 Act, for she would have endeavoured to seduce him from his duty. It was contended by the Government that the offence created

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124. See speech of Mr Dingle Foot: Hansard (H.C.)  
31 October 1934, vol. 293, col. 201.

was no wider than that contained in the 1797 Act. There is no authority on the meaning of the words in either of the Acts, nor upon the meaning of those words that are used in the 1934 Act where they appear in section 94 of the Naval Discipline Act 1957 which creates an offence punishable with a maximum of imprisonment for life.<sup>125</sup>

84. The Act has been little used since its introduction and between 1956 and 1974 there were, indeed, only four prosecutions, two in 1971, one in 1973 and one in 1974; all were concerned with the possession or distribution of leaflets designed to seduce soldiers from their duty or allegiance to the Queen in relation to service in Northern Ireland. Since 1974 there has been an intensification of the activities of the British Withdrawal from Northern Ireland Campaign and publicity has been given to leaflets being distributed such as those headed "Some Information for Discontented Soldiers". It was held in R. v. Arrowsmith<sup>126</sup> that taken as a whole such a leaflet was the clearest incitement to mutiny and to desertion, the distribution of which would be an endeavour to seduce a soldier from his duty or allegiance to Her Majesty. In October 1975 fourteen defendants were charged with conspiracy to seduce soldiers from their duty or allegiance contrary to section 1 of the Incitement to Disaffection Act, and with possession of documents similar in content to those in R. v. Arrowsmith, contrary to section 2 of the Act. They were acquitted of all charges based upon the Act, including the charge of conspiracy.<sup>127</sup> Since then two pending cases of the same

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125. See n.130, below.

126. [1975] 1 Q.B. 678.

127. R. v. Williams and Others, The Times, 11 December 1975. Two defendants were convicted of assisting deserters contrary to s.192 of the Army Act 1955.

nature have been dropped, one in Scotland,<sup>128</sup> and one at Preston Crown Court where no evidence was offered by the prosecution on a charge of possession of a leaflet contrary to section 2 of the Act.

85. The recent use of the 1934 Act has again given rise to suggestions that the legislation constitutes an unwarranted infringement of the liberty of the subject, and it has been suggested that section 2(1) might be used to prosecute any possession of literature which if read by a member of the forces might seduce him from his duty or allegiance. This latter argument is without foundation; it is an essential element of the possession offence that the accused intends to commit or to aid and abet the commission of an offence under section 1, and this cannot necessarily be inferred from the possession of single copies of books and leaflets. Possession of bundles of pamphlets may, of course, taken together with other factors, be some evidence of an intention at least to aid and abet the commission of an offence under section 1.

#### 4. Offences under Acts relating to the Armed Forces

86. There are a number of civilian offences under the Acts relating to the armed forces which overlap with the offences which we have hitherto been considering. They cover interference with duty and acts in relation to desertion and malingering. These, however, have not been referred to us for consideration. They may be summarised as follows -

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128. The Times, 19 December 1975. The Lord Advocate directed the dropping of charges against four defendants of contravening s.1 by distributing leaflets to Marines at a naval open day.

(a) Interference with duty

It is a summary offence to obstruct or otherwise interfere with a member of the Army or Air Force in the exercise of his duty.<sup>129</sup>  
The Navy has no such general offence.<sup>130</sup>

(b) Desertion

It is an offence to procure, persuade or assist any act of desertion or absence without leave of a member of the armed forces or to conceal or assist in concealing a deserter or person absent without leave.<sup>131</sup> It is also an offence to pretend to be a deserter.<sup>132</sup>

(c) Malingering

It is an offence to produce illness in a serving member of the Army or Air Force or to provide drugs in order to aid malingering.<sup>133</sup>

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129. Army Act 1955, s.193; Air Force Act 1955, s.193: maximum punishment: three months' imprisonment and £50 fine.

130. It is an offence under the Naval Discipline Act 1957, s.94, punishable by Court Martial, for a person in a ship or on a naval establishment abroad to seduce naval personnel from their duty or allegiance to Her Majesty: maximum punishment: imprisonment for life.

131. Army Act 1955, s.192, Air Force Act 1955, s.192, Naval Discipline Act 1957, s.97: maximum punishment: on indictment two years' imprisonment and £500 fine, and on summary conviction three months' imprisonment and £50 fine.

132. Army Act 1955, s.191, Air Force Act 1955, s.191, Naval Discipline Act 1957, s.96: maximum punishment: three months' imprisonment and £50 fine.

133. Army Act 1955, s.194, Air Force Act 1955, s.194: maximum punishment on indictment two years' imprisonment and a fine of £500, and on summary conviction three months' imprisonment and a fine of £100.

5. Police Act 1964

87. Section 53(1) of the Police Act 1964 (which supersedes section 3 of the Police Act 1919) reads -

"Any person who causes, or attempts to cause, or does any act calculated to cause, disaffection amongst the members of any police force, or induces or attempts to induce, or does any act calculated to induce, any member of a police force to withhold his services or commit breaches of discipline, shall be guilty of an offence...."

The maximum punishment on indictment is two years' imprisonment and a fine, and on summary conviction six months' imprisonment and a fine of £100.

88. The word "calculated" in this section, as in an earlier section of the Act,<sup>134</sup> seems clearly to be used in the sense of "likely", as indeed it is in many criminal statutes. We agree with Professor Glanville Williams<sup>135</sup> when he says that the primary sense of the word "calculated" involves design or at least foresight, that in a criminal statute it should normally bear this meaning and that its use in the sense of "likely" is unfortunate. It might be advisable, when the legislative opportunity occurs, to substitute the word "likely" for the word "calculated" in this Act where this is the intended meaning.

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134. Sect. 51(3): "Any person who ... wears any article of police uniform in circumstances where it gives him an appearance so nearly resembling that of a member of a police force as to be calculated to deceive ..." and see Halsbury's Statutes, vol. 25 at p.366, note on "Calculated".

135. Criminal Law, The General Part (2nd ed.), p.66.

## 6. Aliens Restriction (Amendment) Act 1919

89. If an alien "attempts or does any act calculated or likely to cause sedition or disaffection amongst His Majesty's Forces or the forces of His Majesty's allies, or amongst the civilian population", he is guilty of an offence carrying a maximum sentence of ten years' imprisonment on conviction on indictment.<sup>136</sup> Whatever the meaning of "calculated" here, where it is used disjunctively with "likely", the very use of the word "likely" indicates the width of the offence. It can be committed without any mental element on the part of a defendant. For it to be an offence in peacetime to do an act likely to cause disaffection amongst the Forces or the civilian population without any requirement of intention is a remarkable example of legislation which is surely out of date.

### B. Consideration of the general offences

90. There is considerable overlap between a number of the offences we have set out above, and we believe that some simplification would be advantageous. As we have pointed out in paragraph 86 above, we have not been asked to review the offences created by the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 which we have set out in that paragraph. We assume that the Services will retain those provisions which they consider appropriate to their own requirements.

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136. Aliens Restriction (Amendment) Act 1919, s.3(1). On summary conviction the maximum term of imprisonment is three months, thus excluding a right to jury trial. Sect. 3(2) of the Act makes it a summary offence for an alien "to promote or attempt to promote industrial unrest in any industry in which he has not been bona fide engaged for at least two years immediately preceding in the United Kingdom."

91. We are concerned with the offences under the Incitement to Mutiny Act 1797 and the Incitement to Disaffection Act 1934. If the latter Act is to be retained (a question we refer to hereafter) it seems to us that there should not be any ambiguity in the field it covers which may arise from the use of the words "duty or allegiance to His Majesty". The offences under the Services legislation are, in our view, sufficient to cover persuading a member of the armed forces to be absent without leave or, in the case of the Army and the Air Force, interfering with his military duty. The Incitement to Disaffection Act should in our view, if it is to be retained, be amended to make it clear that it aims to penalise those who endeavour to seduce members of the Services from their allegiance to the Sovereign, which implies a breach of a fundamental duty of loyalty.

92. We do not seek views on the wider issue of whether there is need to retain the Incitement to Disaffection Act 1934. It can be, and indeed it is, said that this Act restricts the right of free speech, by penalising those who express views to members of the Forces in an attempt to dissuade them from doing what it is their duty as serving members to do and that this is particularly so when those expressing their views do so from reasons of conscience. It is also pointed out that section 2 of the Act makes it an offence to possess, with intent to commit or to aid, abet, counsel or procure the commission of an offence under section 1, any document, dissemination of which among the Forces would constitute such an offence, and gives power to search for and seize such documents. It is argued that the right to freedom of expression, declared in Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, includes the right to receive and impart information and ideas without interference by public authority, and that the legislation contravenes this Article.



93. However, Article 10(2) provides that -

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime...."

Subject to the provisions of the Convention, the extent to which freedom of speech and freedom of action need to be curtailed in the interests of national security is essentially a matter for Parliament. We note that since 1817 - the year the Incitement to Mutiny Act 1797 was revived after its lapse in 1805 - there has been on the statute book the very serious offence of maliciously and advisedly endeavouring to seduce a member of the forces from his duty and allegiance. Further, in 1934 after a very full debate the Incitement to Disaffection Act was enacted. These facts may be taken as some indication of Parliament's opinion as to the need for such legislation and we do not now seek views on the principle of whether such legislation is required in the interests of national security or public safety for the prevention of disorder or crime.

94. Our provisional view is that, having regard to the fact that the Incitement to Mutiny Act 1797 has not been invoked for very many years, and that there are other offences which cover the conduct, that Act at least could be repealed. If the Incitement to Disaffection Act 1934 is to be retained, we would suggest that the words "maliciously and advisedly" in section 1 should be replaced by words more in accord with modern usage. The new words should make it clear that the offence requires an intention to seduce a member of the forces from his allegiance. If the 1797 Act, with its maximum punishment of life imprisonment, is to be repealed and the 1934 Act amended as we have suggested, it is for consideration whether the maximum

penalty for the main offence of contravening section 1 of the latter Act should be increased from the present maximum on indictment of two years' imprisonment and a fine of £200. It is also our provisional view that the offences in the Aliens Restriction (Amendment) Act 1919 can now safely be repealed.

#### PART V: OTHER STATUTORY OFFENCES

95. There are a number of other statutes such as the

Unlawful Oaths Act 1797

Unlawful Oaths Act 1812

Seditious Meetings Act 1817

which bear a very archaic look and would seem to be ripe for repeal or restatement in modern form. Attention was given to them in the Criminal Law Act 1967 and certain amendments were made. It may be that offences created by these Acts can more conveniently be dealt with in the context of offences against public order.

## SUMMARY OF PROVISIONAL PROPOSALS

96. The following is a summary of our provisional proposals -

- (1) The present statutes dealing with treason and treason felony should be repealed, and replaced by new legislation (paragraph 51).
- (2) There should be an offence of treason, applicable only during the existence of a state of war (paragraph 52).
  - (a) This offence should apply to any British subject who is a citizen of the United Kingdom and Colonies in respect of any act of treason anywhere, and to any person (including an enemy alien) who is voluntarily in the United Kingdom in respect of any act of treason in the United Kingdom (paragraph 54).
  - (b) The conduct penalised should be any conduct which is likely to help a country with which the United Kingdom is at war, or to hinder in any way the prosecution of the war by the United Kingdom (paragraph 53).
  - (c) The defendant must intend to help an enemy, or have no substantial doubt that this will be a consequence of his conduct (paragraph 55).
  - (d) The defendant must act without lawful excuse (paragraph 56).

- (3) There should be an additional offence to penalise, even in peacetime, conduct aimed at the overthrow or supplanting of constitutional government by force (paragraph 61).
- (4) The Treason Act 1795 and the Treason Act 1842 (which deal with the personal security of the Sovereign) should be repealed and replaced by new provisions penalising -
  - (a) with appropriate penalties, murdering or intentionally injuring the Sovereign, the Sovereign's consort or the heir to the Throne,
  - (b) as a less serious offence, conduct such as having near the person of the Sovereign, the Sovereign's consort or the heir to the Throne any explosive, weapon or other thing with intent to use it to injure or alarm such person (paragraph 65).

We do not think that these offences need to extend to other members of the Royal Family (paragraph 66).

- (5) The common law offence of misprision of treason should be abolished, but the offence should be re-enacted at least in relation to treason in wartime; we seek views on the need for an equivalent offence in relation to conduct aimed at the overthrow of constitutional government by force. The common law offence of compounding treason should be abolished (paragraph 67).
- (6) The common law offence of sedition should be abolished (paragraph 78).
- (7) The Incitement to Mutiny Act 1797 should be repealed (paragraph 94).

- (8) We make no proposal as to whether the Incitement to Disaffection Act 1934 should be retained (paragraph 93).
- (9) If the Incitement to Disaffection Act 1934 is retained we propose that it should be amended -
  - (a) by replacing the words "maliciously and advisedly" in section 1 by words more in accord with the modern form of words in criminal statutes, and
  - (b) by making it clear that the offence requires an intention to induce a member of the forces to commit a fundamental breach of his duty, amounting to a breach of allegiance (paragraph 94).
- (10) Section 3(1) and 3(2) of the Aliens Restriction (Amendment) Act 1919 should be repealed (paragraph 94).

## APPENDIX I

### 1. Tumultuous Petitioning Act 1661

This Act prohibits tumultuous petitioning to the King or Parliament. But by section 2 the provisions of the Act do not extend to hinder any person or persons not exceeding the number of 10 to present any public or private grievance or complaint to any member or members of Parliament or the King.

### 2. Unlawful Drilling Act 1819

This Act prohibits all meetings and assemblies of persons for the purpose of training or drilling themselves, or being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements or evolutions.

### 3. Public Stores Act 1875

This Act set out various offences in connection with public stores, and prohibits various activities in, near or around ships, docks, wharves, etc.

### 4. Public Meeting Act 1908

This Act makes it an offence for a person to act in a disorderly manner, at a lawful public meeting, for the purpose of preventing the transaction of the business for which the meeting was called.

## APPENDIX II

### The Treason Act 1351

Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth, that is to say; when a man doth compass or imagine the death of our lord the King, or of our lady his Queen or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be proveably attainted of open deed by the people of their condition: and if a man slea the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assise, and all other justices assigned to hear and determine, being in their places, doing their offices: and it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the King, and his royal majesty.





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